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IN THE

# Supreme Court of the United States

NO. 73-63

ROBERT B. YOUNG, *Petitioner*

v.

CLEAR LAKE YACHT BASIN, INC., ET AL,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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## SUBJECT INDEX


| | Page |
|---|---|
| Jurisdiction | 2 |
| Questions Presented for Review | 2 |
| Statement | 4 |
| Reasons for Granting the Writ | 6 |
| Conclusion | 9 |
| Certificate of Service | 9 |
| Appendix A (Memorandum and Order of District Court) | 11 |
| Appendix B (Order of Fifth Circuit) | 40 |
| Appendix C (Fifth Circuit's Order Denying Petitioner's Motion for Rehearing) | 42 |


## LIST OF AUTHORITIES

### CASES


| | Page |
|---|---|
| Austerberry v. United States, 169 F.2d 583 (6th C.A. 1948) | 6 |
| Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 291 (1960) | 8 |
| Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952) | 6 |
| Flowers v. Travelers Ins. Co., 258 F.2d 220, 221 (5th C.A. 1958), cert. den. 359 U.S. 920 (1959) | 6 |
| Garrett v. Moore-McCormack Co., Inc., 317 U.S. 239 (1942) | 7 |
| In Re Read, 224 F. Supp. 241 (S.D. Fla. 1963) | 6 |
| Mason v. Lynch Bros. Co., 228 F.2d 709 (4th C.A. 1956) | 7 |
| Mevin v. Wilner, 424 F.2d 1058 (5th C.A. 1970) | 7 |
| Reed v. The Yaka, 373 U.S. 410 (1963) | 6 |
| Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956) | 6 |
| Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) | 6 |
| Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957) | 6 |
| Strakos v. Gehring, 360 S.W.2d 787 (Tex. Sup. 1962) | 7 |
| The New Berne (4th C.A.) 80 F.2d 244 | 6, 7 |
| Tropical Mauve Products, Inc. v. Birmingham Fire Ins. Co., 247 F.2d 116 (5th C.A. 1956) Cert. den. 355 U.S. 903 (1959) | 7 |
| United States v. U. S. Gypsum Co., 333 U.S. 364, 395 (1945) | 8 |
| Young v. Clear Lake Yacht Basin, Inc., 337 F. Supp. 1305 (S.D. Tex. 1972) | 1, 2 |


### UNITED STATES STATUTES


| | |
|---|---|
| 28 U.S.C. § 1254 | 2 |

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NO. _____

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CLEAR LAKE YACHT BASIN, INC., ET AL,
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## PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

*To The Honorable Chief Justice and Associate Justices Of The Supreme Court Of The United States:*

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Fifth Circuit Court of Appeals entered in the above case on March 7, 1973, affirming the opinion of the District Court entered on January 19, 1972.

## CITATIONS TO OPINIONS BELOW

The Memorandum and Order entered by the District Court can be found at *Young v. Clear Lake Yacht Basin,*

*Inc.*, 337 F. Supp. 1305 (S.D. Tex. 1972). A copy is attached hereto as Appendix "A". A copy of the Order of the Fifth Circuit Court of Appeals' affirmance of the District Court is attached hereto as Appendix "B". (R. II-3, 4) The Order denying Petitioner's Motion for Rehearing on April 16, 1973, is attached as Appendix "C". (R. II-5)

## JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## QUESTIONS PRESENTED FOR REVIEW

I. Whether this is to be the only reported case where one cannot recover damages for injuries sustained on navigable waters while on board a yacht when it caught fire as a result of gas in the bilge from a leaking gasoline tank, a patently unseaworthy condition, against:

(a) The marine surveyor who certified that the yacht was seaworthy, or;

(b) The insurance company who issued their policy on the yacht only after the survey of reasonable fitness had been made, or;

(c) The marine repairman who warranted that the vessel was reasonably fit after the repairs were made and was negligent in failing to test the gasoline tank, or;

(d) The owner of the vessel?

2. Whether, under the facts, the Petitioner can rely upon breach of the maritime warranty of seaworthiness as well as the common law warranty of reasonable fitness?

3. Whether the Circuit Court of Appeals erred in affirming the District Court's holding that Plaintiff not only had the burden of proving the source of the fire and explosion aboard the Yacht Topaz, but also had the burden of disproving alternate sources suggested by the defendants.

4. Whether the Circuit Court of Appeals erred in affirming the District Court's holding that the Defendant marine repairman could not owe the warranty of seaworthiness to plaintiff after making extensive repairs on the Yacht Topaz.

5. Whether the Circuit Court of Appeals erred in affirming the District Court's holding that Petitioner did not have the status of a "seaman" at the time of his injuries; to whom was owed the warranty of seaworthiness.

6. Whether the Circuit Court of Appeals erred in affirming the District Court's holding that Plaintiff was not only contributorily negligent but also that such negligence would bar his recovery under any theory.

7. Whether the Circuit Court of Appeals erred in affirming the District Court's holding that the Texas "accepted work" doctrine prohibited recovery against the marine repairman.

8. Whether the Circuit Court of Appeals erred in affirming the District Court's clearly erroneous holding that Surveyor Roberts was not an agent of the insurance carrier and that any negligence by Roberts was not a proximate cause of Plaintiff's injuries.

9. Whether the Circuit Court of Appeals erred in affirming the District Court's clearly erroneous holding that Plaintiff had compromised his claim against the insurance carrier.

## STATEMENT

Petitioner filed his lawsuit before the Federal District Court for the Southern District of Texas alleging that a repairman, marine surveyor, marine insurance carrier and a yacht owner had in varying degrees breached a duty of seaworthiness and common law warranties in regard to the condition of the Yacht Topaz as well as committing various acts of negligence. The Yacht Topaz was owned by the Young Manufacturing Co., Inc., of which Petitioner and his brother were the principal officers. Shortly after the Yacht was purchased their marine insurance carrier required the company to submit the yacht to an inspection by a marine surveyor who in turn required it to be submitted to a repairman for certain repairs. A month after the repairs Petitioner was aboard the yacht when there was a fire and explosion which Petitioner alleged resulted from a leaking gasoline tank which condition should have been patently obvious to the inspector and the repairman.

The trial court found that none of the Defendants had made warranties to the Plaintiff and furthermore, that none of them, including the yacht owner owed a duty of seaworthiness to the Plaintiff. The trial court dwelled on its finding that Petitioner had failed to prove up the source of the leaking fuel or the source of the igniting spark.

From a reading of the trial court's opinion it is obvious that the Court made an initial determination of who was to prevail in the lawsuit and then attempted to reconcile Petitioner's three theories of negligence, common law warranty and seaworthiness against each of the four defendants, into a common factor of no recovery. Such an

approach has led the Court into inconsistencies of law and required it to ignore the great weight of the evidence to the injustice of the severely injured Plaintiff-Petitioner.

For example, the Court holds that the repairman Clear Lake Yacht Basin made *no* common law warranties. Assuming they did, the Court says: the deteriorated twenty (20) year old gas tank shown in numerous photographic exhibits was not in that condition while in the possession of Clear Lake Yacht Basin several months prior to the taking of the pictures; careful observation would not have revealed that a defect was likely to occur in the future (R.I-Appendix p. 151); there was no negligence because Plaintiff failed to prove proximate cause; even if he did prove proximate causation he was barred by his contributory negligence; there was no duty of seaworthiness because that can only run from the Yacht owner; however, the Yacht owner is not liable because Plaintiff is not a "seaman."

This tightly woven path through the forest by the trial court has caused it to miss seeing the trees. The law is not a neat and orderly chess game but must concern itself with such messy details as evidence. The explosion and fire on board the Topaz was per se evidence of its unseaworthiness. No one contended that the Plaintiff walked up to the boat, poured gasoline in the bilge and struck a match to it. Furthermore, the only serious evidence as to the source of the fuel was a deteriorated fuel tank inspected and handled by a marine inspector and marine repairman. Even the trial court felt called upon to question the propriety of the Defendant surveyor's inspection which only took an hour and a half. (R. 1-A. 161-162). Was this intended to sweeten the quality of Justice dealt to the Petitioner.

## REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' affirmance of the finding that a repairman cannot owe the duty of seaworthiness is in direct conflict with this Court's holdings in *Reed v. The Yaka,* 373 U.S. 410 (1963) and *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.,* 350 U.S. 124 (1956). While it is clear that the duty of seaworthiness is a "nondelegable" of the ship owner it is also clear that this duty can run concurrently from a repairman to perform his duties in a workmanlike manner.

2. The Court of Appeals' affirmance of the finding that Petitioner did not have the status of a "seaman" to whom the duty of seaworthiness is owed is in direct conflict with this Court's decisions in *Desper v. Starved Rock Ferry Co.,* 342 U.S. 187 (1952); *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946) and *Senko v. LaCrosse Dredging Corp.,* 352 U.S. 370 (1957). The non-maritime nature of the so-called regular work or duties is completely irrelevant. *Flowers v. Travelers Ins. Co.,* 258 F.2d 220, 221, (5th C.A. 1958), cert. den. 359 U.S. 920 (1959). Whether or not compensation is received is not controlling on the issue of whether Petitioner was a member of a "crew" at the time of his injury. *In Re Read,* 224 F. Supp. 241 (S.D. Fla. 1963).

3. The burden of proof placed on the Petitioner in proving negligence and unseaworthiness exceeds elementary principles of law requiring a preponderance of the evidence rather than beyond a reasonable doubt. Evidence that presence of gas fumes emanated from a gasoline tank may be based on circumstantial evidence alone. *Austerberry v. United States,* 169 F.2d 583 (6th C.A. 1948); cf. *The New Berne* (4th C.A. 80 F.2d

244. Defects even though latent can be presumed to establish per se evidence of unseaworthiness. *Tropical Mauve Products, Inc. v. Birmingham Fire Ins. Co.*, 247 F.2d 116 (5th C.A. 1956) cert. den. 355 U.S. 903 (1959).

4. The trial court's finding that Petitioner was contributorily negligent and that such negligence was a complete bar to recovery under any theory was patently erroneous in regard to Petitioner's claim the Yacht was unseaworthy. Petitioner's negligence must be found in terms of degree which reduces his recovery pro rata. *Mason v. Lynch Bros. Co.*, 228 F.2d 709 (4th C.A. 1956); *Mevin v. Wilner*, 424 F.2d 1058 (5th C.A. 1970). The burden of proof on the issue of contributory negligence is *on the defendant. Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239 (1942). Petitioner can only refer this Court to the voluminous record and exhibits in this case to show that the trial court's finding on this important issue was based on evidence in the realm of conjecture and rank speculation.

5. The trial court's finding that Petitioner's recovery against the marine repairman Clear Lake Yacht Basin, Inc., was barred by the so-called Texas "accepted work" doctrine is in direct conflict with the State Law of Texas. The Texas Supreme Court in *Strakos v. Gehring*, 360 S.W.2d 787 (Tex. Sup. 1962) has held that acceptance of defective work should not be a legal excuse for the negligent performance of that work.

6. The trial court's finding affirmed by the appeals court that (1) the marine surveyor was not an agent of the insurance carrier; (2) that any negligence by the surveyor could not have been a proximate cause of Plaintiff's in-

juries; and (3) that Plaintiff had compromised his claims were not supported by substantial evidence and clearly erroneous. This Court can only be left with the "definite and firm conviction that a mistake has been committed" if it reviews the transcript and the numerous exhibits in this case. *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 395 (1945); *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 291 (1960).

7. The questions presented are one of general public importance to the field of maritime law and to the increasing numbers of pleasure boat owners in the general public who are inexperienced mariners. Commenting on the Defendant Roberts cursory inspection of the Yacht Topaz the trial court noted:

> "A marine surveyor, particularly one who engages in the burgeoning pleasure boat field where the majority of boat owners are not educated and experienced mariners, performs an indispensable service, often a life-saving service, to his clientele. Whether the survey be conducted for insurance purposes or for the purchase or sale of a vessel, this examination may be, in all likelihood, the only one made by an experienced hand. The landlocked public perhaps can rely on workmen to inspect and repair most major household appliances and not be placed in jeopardy of serious injury or death, at least in the majority of instances, in the event that the repairman inspects in a cursory manner or performs substandard work. But reliance by laymen on such skilled professionals as marine surveyors to inspect and advise as to pleasure boats with their sophisticated machinery, high powered engines and other gear must be of a different caliber, one of which the law must take cognizance in a proper case. "There are few other uses of petroleum fuels by the public in which

the fire and explosion hazards parallel those possible in motor craft."

Petitioner submits that this is the "proper case."

## CONCLUSION

For the foregoing reasons Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

BROCK & WILLIAMS

By Warner F. Brock

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## CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July 1973, a true copy of the foregoing Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals, was placed in the United States mail, postage prepaid, to the following counsels: Mr. James E. Ross, Ross, Griggs & Harrison, Attorneys At Law, Chamber of Commerce Building, Houston, Texas 77002; Mr. L. Glen Kratochvil, Attorney At Law, One Shell Plaza, Houston, Texas 77002; Mr. William E. Hall, Jr., Attorney At Law, Houston First Savings Building, Houston, Texas 77002; Mr. Eugene A. Cook, Butler, Binion, Rice, Cook & Knapp, Attorneys At Law, Esperson Building, Houston, Texas 77002; Mr. John Lee Watkins & Hamilton, Attorneys At Law, The Main Building, Houston, Texas 77002.

Warner F. Brock

WARNER F. BROCK

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 68-H-489

(January 21, 1972)

ROBERT B. YOUNG, Plaintiff,

v.

CLEAR LAKE YACHT BASIN, INC., SECURITY INSURANCE COMPANY OF NEW HAVEN, CAPTAIN JACK ROBERTS, JACK YOUNG and YOUNG FURNITURE MANUFACTURING COMPANY, INC., Defendants,

UTICA MUTUAL INSURANCE COMPANY, ALL RISK INSURANCE AGENCY and MICHIGAN MILLERS INSURANCE COMPANY, Intervenors.

WARNER F. BROCK, Brock & Williams for the Plaintiff.

L. GLEN KRATOCHVIL, Schirmeyer & Kratochvil for Defendant Clear Lake Yacht Basin.

JAMES E. ROSS, Ross, Griggs & Harrison, for Defendants Security Insurance Co. of New Haven, Captain Jack Roberts and Jack Young.

WILLIAM E. HALL, JR,. and EVERETT L. ANSCHUTZ, Jr., for Defendant Young Furniture Manufacturing Company, Inc.

JONATHAN DAY, Butler, Binion, Rice, Cook & Knapp for Intervenors Michigan Millers Mutual Insurance Co. and All Risk Insurance Agency.

A. J. WATKINS and JOHN LEE, Watkins & Hamilton for Intervenor Utica Mutual Insurance Company.

MEMORANDUM AND ORDER

Early in 1966, a single engine, twenty-six foot Chris-Craft Sedan Cruiser, model 1948, was purchased with funds supplied by Young Furniture Manufacturing Company, Inc. [hereinafter the Company], and title was taken in the name of Jack Young, an executive officer of the Company and brother of the plaintiff. The actual ownership of the vessel is disputed. On April 16 of that year a Houston independent marine surveyor, Captain Jack Roberts, made a survey of the yacht TOPAZ, and shortly thereafter Clear Lake Yacht Basin, Inc. [hereinafter Clear Lake] was engaged to make certain repairs on the vessel, some of which were upon the recommendation of Surveyor Roberts. Prior to and contemporaneously with the execution of the commissioned work by Clear Lake, certain officers and employees of the Company, including the Young brothers, engaged in repair work aboard the TOPAZ, a major portion of which work was painting, replacing brightwork, upholstering and other cosmetic repairs. After Clear Lake completed its repairs on or about May 7, 1966, Surveyor Roberts certified that the repairs had been performed satisfactorily on the eighteen year old pleasure craft. Security Insurance Co. thereupon issued its policy Y 118 126 to Jack Young on the TOPAZ, providing protection and idemnity insurance for bodily injury for one person in the amount of $50,000. The Young brothers and Young Furniture Company paid for the repairs, and all work done on the vessel was accepted. The TOPAZ was then used for pleasure and business purposes on several occasions by the Young

brothers over a period of approximately one month prior to the casualty.

One June 9, 1966, an explosion and fire occurred on the TOPAZ, seriously injuring the plaintiff, Robert Young, who was the only person aboard at the time. It is this event which culminated in the suit now before the Court. Plaintiff has alleged numerous derelictions of the defendants including counts of negligence and breaches of warranty to furnish a seaworthy vessel. These breaches and the potential liabilities therefor will necessarily be explored in depth, infra, as will the alleged contributory negligence of plaintiff. The Court's initial inquiries, however, must be directed toward the explosion[1] itself, its nature, intensity, and proximate cause.

## I.

## CIRCUMSTANCES LEADING UP TO THE EXPLOSION

After Surveyor Roberts completed his condition and valuation survey of the yacht TOPAZ and made certain written recommendations as to repairs necessary for the obtaining of insurance coverage,[2] the Youngs engaged

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1. Throughout this opinion, the occurrence will be variously referred to as an explosion and/or fire. The use of one term or the other is not intended as a specific finding that both actually occurred. While this Court does find that a fire occurred, the evidence does not clearly support an additional finding of an actual explosion, and, inasmuch as this is not critical to a resolution of the case, no such finding is made.

2. *See* plaintiff's exhibit 1, report of survey by Surveyor Jack Roberts. On page 3 of the report, the following recommendations are made:

> (A) Toilet be secured in place, through hull fitting for intake be reseated and hose clamp be replaced; (B) Fire extinguisher be located at wheel and at afterdeck while refinishing vessel;

Clear Lake to accomplish this work on the yacht. The TOPAZ was hauled out at the Clear Lake yard for about two weeks commencing in late April and terminating approximately May 7, 1966. Clear Lake's employees completed the recommended repairs which were subsequently approved by Surveyor Roberts, and in addition, they performed separate repairs to the hull which were requested by the Youngs. As indicated, the TOPAZ was put back into the water at Clear Lake repair yard in early May, and subsequently it was operated by either Jack or Robert Young on a number of pleasure and business entertainment excursions.[3] In fact, a total of almost 150 gallons of gasoline were purchased on several occasions for the operation of the TOPAZ during this period of approximately one month.[4] Also during this time it is undisputed that no gasoline leakage from any

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(C) Broken frame knee on starboard side be replaced or sistered; (D) Deck drain flanges on transom be reseated and missing screws be replaced; (E) Battery be secured in place and frayed cable be replaced; (F) Tachometer cable be replaced and water pump be overhauled; (G) Fuel and vent line be secured in place and broken band on tank be replaced with chafing pad between tank and band; (H) Keel be scarphed in where split and keel bolts be replaced where bent and damaged; (I) Shaft bearing be replaced, shaft straightened and propeller be reconditioned. Rudder is fractured and should be replaced.

3. Also subsequent to the completion of Clear Lake's work, from May 7, 1966, to the date of the fire on June 9, 1966, Jack and Robert Young performed various miscellaneous repairs on the TOPAZ.

4. *See* plaintiff's exhibit 32, receipts for the purchase of gas at Boat Town on several occasions totaling 147.5 gallons, and testimony of Robert Young (cross-examination by Mr. Kratochvil), that fuel consumption of the vessel's single engine was believed to be approximately six gallons per hour. Assuming the accuracy of such estimate, this indicates some 25 hours of operation of the TOPAZ, less the time necessary to consume the disputed quantity remaining in the tank after such operations.

source was noted on the craft by either Jack or Robert Young. No test was ever made by plaintiff or any of the defendants herein for leakage in the gas tank, and, indeed, no need for such a test was ever evidenced prior to June 9, 1966.[5]

On June 9, while the TOPAZ was berthed at Boat Town Marina in Seabrook, Texas, plaintiff who was alone had parked his automobile within a few feet of the covered slip where the vessel was moored and prepared to go aboard. He immediately smelled strong gasoline fumes coming from the TOPAZ. He boarded the vessel, and shortly thereafter the explosion occurred. It is the sequence of events which took place between the time plaintiff went aboard and the time of the explosion that constitutes one of several major areas of sharp dispute in this lawsuit.

## A.

## SOURCE OF THE SPARK

There is considerable testimony that plaintiff opened the engine hatch, determined that the fumes were coming from the TOPAZ, and then went forward into the cabin and switched on the electric blower and the electric bilge pump, with the explosion and fire immediately following. This is the plaintiff's story. Additionally, after he initially smelled gas fumes and actually heard gasoline leaking, it is his version that he reached down into the engine compartment and felt gasoline dripping from the gas tank. Then, either unaware or unmindful of the possible consequences, he proceeded to turn on both the blower and the bilge pump in an effort to clear the TOPAZ of the com-

5. Testimony of Robert Young.

bustible fumes which permeated the vicinity. A likely conclusion suggested by this account would be that the explosion or fire was caused by gasoline dripping from the tank which was ignited by an electrical spark from the energizing of either the blower or the bilge pump. There is, however, only the most speculative testimony in this case concerning the condition of the pump and blower, that is, whether or not they were operational, whether they were explosion proof, and whether the wires connecting this gear to their respective starter switches were in good condition.

A second theory as to the source of the spark was advanced and developed at the trial. There is evidence that plaintiff had planned to install a new voltage regulator in the engine compartment on the TOPAZ.[6] Plaintiff testified that the voltage regulator had been malfunctioning when he had used the boat on one or more occasions, that he had removed the cover from the voltage regulator on May 30, when he was last aboard the vessel prior to the date of the explosion and that the cover had never been replaced. He also testified that on June 9 he had brought a new voltage regulator with him in order to replace the faulty one. There is further evidence in the record from other witnesses to the effect that a voltage regulator was seen on the deck near the port side of the engine hatch on June 9, and that it was still there the following day.[7] However, plaintiff denied actually working on the voltage regulator on the day of the casualty and asserted that the voltage regulator was never taken from his car.

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6. Deposition of Robert Young at 42.

7. Deposition of Williams at 22-23; testimony of Surveyor Roberts.

To lend credence to the theory that plaintiff set off the explosion by causing a spark while replacing the voltage regulator in the engine compartment, there is evidence in the record as to the nature of plaintiff's extensive injuries as well as evidence of probable location of the greatest concentration of flames on the boat. The most severe burns which plaintiff received were on his face, arms, shoulders, thighs and knees; that is, on the front portion of his body extending from his head to his knees.[8]

Testimony and exhibits further establish that the greatest concentration of flames emanated from the engine space which is located below the deck and reached through a hatch immediately aft of the cabin door. Mr. Cliff Williams, one of the persons who assisted in extinguishing the fire, testified that the main source of flames was from the engine hatch.[9] The plaintiff likewise indicated this to be a major source of fire, testifying that he tried to leave the cabin after starting the pump and blower and hearing the explosion, but was blocked by a "wall of flame" immediately outside the door.[10] In line with such testimony, plaintiff's expert, Mr. Lynn McWaters, a consulting chemical engineer and certified marine chemist, testified that the area most severely damaged by the fire was the starboard side of the engine compartment. There is further proof to the effect that, considering the relatively minor amount of burn damage

8. Testimony of Robert Young on cross-examination by Mr. Ross; deposition of Williams at 28-29.

9. Deposition of Williams at 30.

10. Testimony of Robert Young on cross-examination by Mr. Ross.

shown to have occurred aboard the TOPAZ, although the initial burst of flame was of great intensity, the duration of the fire was very short.[11] The suggested conclusion which the defense urges should be reached from an analysis of this evidence is that the plaintiff was not in the cabin when the fire or explosion occurred, but was standing or squatting over the open engine hatch changing a voltage regulator and, while so occupied, he struck a spark in some manner which ignited the gasoline.[12]

B.

## SOURCE OF THE FUEL

It is the plaintiff's thesis in this lawsuit that the source of gasoline which fueled the fire causing his injuries was the leaking gas tank on the TOPAZ which Surveyor Roberts and personnel at Clear Lake should have detected and corrected. The plaintiff's testimony that he felt gasoline dripping from the bottom of the gas tank shortly before the fire has been vigorously challenged by Surveyor Roberts who related that it is physically impossible for a person to reach or feel the bottom of the gas tank from a position on the deck. According to Roberts the only way such an examination of the tank could be made without removing the tank would be to lie prone in the bilges.

There is further testimony contradictory of plaintiff's version. Surveyor Roberts testified that his original survey of the TOPAZ including visual inspection of the gas tank and all attachments, during which he crawled into the

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11. Testimony of Dr. Gary Fisher.

12. Deposition of Williams at 27-31.

bilges of the vessel and examined the bottom of the tank. He found no significant corrosion or damage to the tank which would evidence a leak, and, indeed, he found no leak. Both Surveyor Roberts and Mr. Gerald Holderby employed by Clear Lake testified that on or about June 13, some three or four days subsequent to the fire, they conducted a hydrostatic test of the gas tank in its cradle and still found no leakage. In order to make the test, they had to fill the remaining space in the tank with water which took approximately a half hour. A full tank of mixed gas and water remained after the test was performed.

The plaintiff's expert, Marine Surveyor Lynn McWaters also looked into this aspect, and his testimony casts the record into a state of irreconcilable confusion. Although the written report of his findings was not offered into evidence, McWaters related that he examined the gas tank on board the TOPAZ on July 26, over six weeks after the casualty, and physically removed the tank from the vessel on August 2. He thereupon drained the tank which was approximately two-thirds full of gasoline, and transported it by truck to his testing laboratory in Houston where he filled it with water. Rust was then scraped from the outer surface of the tank, and a small leak appeared, indicating to McWaters that the interior of the tank had rusted or corroded.

If Mr. McWaters is to be believed, then other testimony at the trial is necessarily cast in jeopardy. The reverse is also true. Either no hydrostatic testing was done by Mr. Holderby and Surveyor Roberts on June 13, or at some time between June 13 and July 26, a quantity of gasoline found its way into the tank. Otherwise, it could not be two-thirds full of fuel when examined by Mr.

McWaters. It is equally evident that plaintiff's own examination of the tank on June 9, the day of the fire, can only have been less than conclusive, if it is in truth physically impossible to touch the bottom of the tank from any position on the deck of the TOPAZ as indicated by the testimony of Surveyor Roberts. The Court is thus left with unchallenged evidence *only* that the tank did leak some six weeks *after* the explosion and fire, *after* it was removed from the TOPAZ, *after* it was hauled some miles in a pickup truck from LaPorte to the testing laboratory on Harrisburg Boulevard in Houston, and *after* it was filled with water and scraped.

Were it necessary to dissect each and every facet of asserted causation in order to resolve the issue of liability in this case, the multiple problems on credibility would be virtually insurmountable. Fortunately, when all of the proof is fairly assessed, it becomes evident that it is unnecessary to resolve the hotly disputed issue as to whether or not the gas tank leaked on June 9, 1966, the date of the fire. This is so because there is a significant intervening period of time after the Young brothers took delivery and assumed custody and control of the vessel from Clear Lake and the date of the casualty. By that date Robert and Jack Young had already been using the TOPAZ for over a month on business and pleasure cruises and had burned almost 150 gallons of gasoline in operating its single engine without any semblance of a leak in the gasoline tank or any where else on board. The critical point in time as concerns the liability of the various defendants thus becomes May 7, 1966, the date that the repair work of Clear Lake was accepted and possession and control of the TOPAZ returned to the plaintiff and his brother. Similarly, the tests and surveys

conducted on the vessel at various times subsequent to the explosion and fire are also non-determinative, inasmuch as they fail to relate back to May 7 or even to June 9, 1966, the date of the fire.

As for other testimony at the trial, there is a dearth of persuasive evidence supportive of the size and nature of the leakage allegedly found by the plaintiff. From July 26 to August 2, six or seven weeks after the fire, there was little or no leakage from the gas tank. The small amount of change (one inch) in the level of gasoline in the tank was no more than that normally expected from evaporation or from a discrepancy in measuring or "sticking" the tank.[13] Surveyor Roberts, Mr. Holderby and Mr. Williams all testified that they smelled no gasolines fumes after the explosion and fire. On the other hand, Mr. Solomon testified that he could smell gas in the bilge of the TOPAZ some time subsequent to the explosion when he cleaned and washed the bilges, and Jack Young, the plaintiff's brother, testified that there were strong gas fumes present on the Saturday following the fire. Obviously, these versions cannot be reconciled, and the Court must look elsewhere in the proof.

Other factors militate in favor of little or no leakage from the gas tank which can be causally related to the casualty. The great weight of the evidence indicates a fire of short duration, a flash fire accompanied by a dull "thud" or "whoosh" rather than an actual explosion.[14] This account is supported by the fact that the TOPAZ was only slightly damaged by the fire.[15] The wooden

13. Deposition of McLaughlin at 52-54.

14. Testimony of Robert Young.

15. Photographs, Plaintiff's exhibits 78 and 79.

cradle upon which the starboard side of the gas tank rested, and which lay directly under the section of the tank allegedly leaking, was virtually undamaged, as was the padding between the tank and cradle. Little scorching or blistering occurred on the painted surfaces of the vessel in the vicinity of the gas tank. The tank did not explode and showed no fire damage.[16] The cumulative effect of this proof weighs heavily against the existence of a leak in the gas tank on June 9 or at any time prior thereto, particularly the existence of a leak of such size that gasoline could be heard or felt dripping beneath the tank.

Speculation as to the source of the fuel which was ignited is plentiful in the record of this case. Gasoline could have been deposited in the bilge of the TOPAZ as a consequence of spillage during refueling or perhaps by leakage or overflow from the dual carburetors, the latter being a common problem in the design and make of the particular engine installed on the TOPAZ.[17] Although leakage or overflow from the dual carburetors would provide only a very limited fuel source, perhaps a teacup full of gasoline, the presence of this small amount in a vaporous state and enclosed beneath the deck of the vessel is viewed as entirely consistent with the type of fire that occurred.[18]

A further complicating factor in determining the source of the fuel is created by testimony that the TOPAZ,

16. Testimony of McWaters and Holderby.

17. Testimony of Mr. Holderby.

18. But *see* plaintiff's exhibit 87, a speed memo from John Barnes of Wm. H. McGee & Co., dated June 10, 1966, reporting on Surveyor Roberts' post-explosion examination of the TOPAZ:

> Surveyor viewed boat today and reported all gasoline connections[,] fill lines and vents proper[;] however there was about 2" of gasoline in bilge.

similar to most Chris-Craft vessels of like design, normally lies afloat somewhat down by the head, that is, with the bow section of the vessel lower in the water than the stern.[19] Thus, assuming that there was gasoline floating on the water in the bilge, it is suggested that such water and gasoline could have passed through the limberholes in both the longitudinal frame the (keelson) and the transverse frames (the ribs), and thence toward the bow. The argument is made that this accounts for the presence of flames coming through the deck of the cabin and the amount of fire damage which resulted in the cabin. However, in all fairness this situation might also be urged to account for the presence of minimal damage in the vicinity of the gas tank, well astern of the cabin, even if the tank were thought to be leaking.

This Court finds itself confounded in its efforts to forge solid links in a chain of credible, consistent and conclusory proof as to how this casualty occurred.[20] However, it is not alone in this respect. Captain Eugene

20. The record is replete with antithesis of which these are examples: The plaintiff testified that he leaned down from the deck to feel gasoline dripping from the tank; Surveyor Roberts stated that such an act is physically impossible. Three witnesses were sure they smelled no gasoline after the fire; two others did smell fumes around the same time. Cliff Williams could recall some five years later a voltage regulator and Delco-Remy box aboard the TOPAZ on June 9, 1966; Robert Young could recall never having taken the purchased voltage regulator on the TOPAZ. A hydrostatic test was performed on the gas tank by Surveyor Roberts and Mr. Holderby, about June 12, 1966, by filling the remaining space in the tank with water in an abortive effort to force gasoline out through the vent line; a full tank remained after the test; yet on August 2, 1966, Mr. McWaters again drained the same *45* gallon tank of 25 to 30 gallons of gasoline before performing a similar hydrostatic test which revealed a damp area on the tank.

19. Testimony of Surveyor Roberts.

McLaughlin, a yacht broker and marine surveyor, testified that he could not determine the cause of the fire.[21] Surveyor Roberts testified similarly. Mr. Bill Jones, a yacht man of some 35 years experience and also a marine surveyor, testified that he could venture no opinion as to the cause of the fire. Mr. Gerald Holderby, president and past general manager of Clear Lake Yacht Basin, ventured an opinion as to gasoline leakage or spillage from the dual carburetors of the TOPAZ, but he equivocated later in his testimony, stating that gasoline could have come from a number of places. Surveyor Lynn McWaters ventured an opinion that the spark could have emanated from the fathometer cable, which was heavily burned, but he agreed that other sources were also present.

When all is said and done including the careful weighing of the credibility of the witnesses in this case, the conclusion to be reached is that the plaintiff simply has not met his burden of proof. He has failed to demonstrate by a preponderance of the evidence that the alleged derelictions of one or more defendants contributed to cause the fire and explosion; instead, a record has emerged from this trial which is replete with confusion and contradiction. Under these circumstances, this Court, therefore, does not feel warranted in selecting any one of the various theories of causation brought out in the testimony, as none fairly stands up under scrutiny. To the contrary, certain other evidentiary matters are clear and can be reliably used in reaching a result.

The Court does find that the explosion and fire were proximately caused by some act, event or condition initiated by the plaintiff while the vessel was in his ex-

21. Deposition of McLaughlin at 68.

clusive control and possession.[22] The Court does find that the gasoline tank did not leak on or before May 7, 1966, at which time the plaintiff and/or Company inspected and accepted the repair work performed by Clear Lake, and took possession of the TOPAZ. On the basis of the testimony of the plaintiff himself and his brother, the Court does find that the gasoline tank did not leak while in their possession and under their control after May 7 and before June 9, 1966. However, this Court does not make a finding as to whether the gasoline tank leaked on the date of the fire, June 9, 1966, and, indeed, it is unnecessary to do so in order to resolve this case. The absence of further findings of fact as to the source of the fuel is not determinative of this suit, inasmuch as recovery against all defendants must necessarily be denied, even assuming, *arguendo,* that all facts occurring on the date of the casualty and thereafter were found exactly as alleged by plaintiff.

## II.

## THE NEGLIGENCE OF THE PLAINTIFF

If, it is assumed, *arguendo,* that the plaintiff, in fact, did no work on the voltage regulator or any other wiring on the TOPAZ, and it is further assumed, as plaintiff alleges, that the spark was caused by some defect in the

22. Plaintiff has repeatedly tried to establish some legal connection between Clear Lake Yacht Basin and Boat Town Marina, to support his contention (1) that Boat Town conducted or should have conducted periodic checks on all vessels berthed at that facility and (2) that Clear Lake is responsible for the failure of the Boat Town attendant to discover gasoline fumes on June 9, 1966. The Court finds, on the evidence presented, that the two were separate business entities (testimony of Mr. Holderby), and that in any event the TOPAZ was in the possession and control of the Youngs, rather than the Boat Town personnel.

wiring or switches of the bilge pump or blower, plaintiff's actions were so patently wrong that this Court must conclude his own negligence proximately caused the explosion and fire. No reasonably prudent man acting under the same or similar circumstances, that is, a man boarding a vessel absolutely reeking with the odor of gasoline, and then hearing and feeling gasoline drip from the gas tank, would proceed to activate any electrical apparatus. This is so, even if the electrical gear was in perfect working order, given the attendant and foreseeable risk of generating a spark from such equipment which could ignite the heavy concentration of gas fumes, *cf. In re Reading*, 169 F.Supp. 165 (N.D.N.Y. 1958), *aff'd*, 271 F.2d 959, 1960 A.M.C. 214 (2d Cir. 1959). Plaintiff's own testimony reflects beyond question that he knew and fully appreciated the danger of explosion or fire before he pulled the switches to activate the electric blower and the electric bilge pump.

## III.

## THE REASONS FOR NON-LIABILITY OF THE DEFENDANTS

Notwithstanding plaintiff's failure to prove by a preponderance the causative facts of the explosion and fire, and irrespective of this Court's conclusion that plaintiff's negligence was the proximate cause of the occurrence, there are other strong factors which preclude the directing of a recovery in favor of plaintiff against any of the defendants in this case. Normally, under such circumstances, the Court would go no further in making its findings. However, since the opinions and conclusions arrived at are the composite result of plaintiff's inability to meet his

burden of persuasion as well as the result of affirmative findings distilled from the other evidence including the making of credibility choices, where necessary, this Court feels obligated to rule as well on the specific theories of liability advanced by the plaintiff against the various defendants.

## A.

## CLEAR LAKE YACHT BASIN, INC.

Plaintiff alleges that, in making repairs to the TOPAZ, Clear Lake warranted that the TOPAZ, including the gas tank, was reasonably fit for the purpose for which it was intended, that it was free of defects and that this warranty was breached.

This Court cannot find that Clear Lake made any general warranty of fitness or freedom from defect, either express or implied. First, Clear Lake was *not* hired to survey the vessel and make all repairs necessary to place such vessel in a seaworthy condition. Clear Lake was hired to make certain specific repairs on the TOPAZ, as listed in the survey report of Surveyor Roberts and as supplemented by independent requests for certain hull repairs by the Company or the Young brothers, cited *supra*. Not included in the specific work order and not authorized or ordered separately were testing, repair or replacement of the gas tank. Even assuming, *arguendo*, that some duty developed upon the repairman to advise the owner of the TOPAZ that the gas tank was leaking or would probably leak, the evidence established, and this Court so finds, that the gas tank was not leaking while in the possession and control of Clear Lake. Nor was the tank in such a deteriorated condition that normally

careful observation would indicate a defect likely to occur in the future. Plaintiffs' own testimony is that he never requested or authorized any work to be done on the gas tank, nor did he ever have any reason to suspect that such work should be done prior to the date of the explosion. No witness testified to the presence of gasoline fumes or leaks prior to June 9, more than thirty days after the TOPAZ left Clear Lake's facilities on May 7. The fire occurred approximately a month after the second examination of the vessel by Surveyor Roberts, after acceptance by the Young Brothers and the Company of all repairs done by Clear Lake and after repeated use of the vessel by one or both of them for various pleasure and business excursions. The vessel was and had been for sometime under the exclusive control and possession of the Company and the Young brothers. Under the evidence presented at the trial of this case, there is no legally sound way for this Court to find that any defect in the TOPAZ or her appurtenances that might have existed on or after June 9, 1966, also existed on or before May 7, 1966, or that any such defect should have been discovered by Clear Lake. *Cf. The Wheeler-Shipyard Hull No. 304,* 1 F.Supp. 402 (E.D.N.Y. 1932).

If it is assumed, as this Court believes it must, that no traceable defect in the TOPAZ existed for Clear Lake to discover and repair, then it must necessarily follow that Clear Lake cannot be held liable to the plaintiff. However, it is also a general rule that an independent Contractor such as Clear Lake cannot be held liable for injuries resulting from defects traceable to such contractor's failure to satisfactorily complete his repairs, once the owner of the vessel has accepted the work and taken possession and the defect is observable to the owner

upon a reasonable inspection. *See Hartford v. Coolidge-Locher Co.*, 314 S.W.2d 445 (Tex.Civ.App.—San Antonio 1958, *no writ*), 27 Am. Jur. 2d, *Independent Contractors* § 49 (1968). Although this theoretical alternative is not factually relevant here, the legal result is the same. Clear Lake can have no liability to the plaintiff on a warranty or a negligence theory.

Lastly, the claims alleged by plaintiff against Clear Lake based upon the warranty of seaworthiness are legally invalid, inasmuch as the warranty is (1) a nondelegable duty of the shipowner, and is (2) extended only to *seamen* and those shore-based workers who perform work traditionally done by seamen, *Seas Shipping Co. v. Sieracki*, 327 U.S. 85 (1946); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944). Clear Lake is not the vessel owner and does not stand in the position of any other who owes the warranty such as an owner pro hac vice; the plaintiff is not a seaman and, upon the evidence before this Court, cannot be said to be engaged in work traditionally performed by seamen. The TOPAZ was a private pleasure craft. It was used in such a manner at all times material to this suit, and it did not have a crew. Although it was manned by either Robert or Jack Young or both, whenever it was operated, their "sporadic contacts for brief periods of time" aboard the TOPAZ fall far short of meeting the criteria established to place them in a position to enjoy the status of seamen, *Labit v. Carey Salt Co.*, 421 F.2d 1333 (5th Cir. 1970); *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959) and cases cited therein.

These findings by the Court resolve the question of whether the warranty of seaworthiness is owed by *any* defendant to the plaintiff herein, since the plaintiff simply

cannot qualify to be characterized as falling within the class of persons protected by such a warranty. That being so, it is unnecessary to resolve the question of ownership of the yacht TOPAZ as it relates to the issue of seaworthiness.

## B.

## SECURITY INSURANCE COMPANY OF NEW HAVEN

A policy of insurance was issued to Jack A. Young by Wm. H. McGee & Co. which is the general agent and marine manager in Texas for Security Insurance Co. of New Haven. Under the provisions of this policy written on a Security Pleasure Purpose Yacht Form, the hull of the TOPAZ was insured for $2,600 and the Protection and Indemnity Insurance coverage insured Jack Young against liability for loss of life and bodily injury, with coverage as to any one person limited to $50,000.

Plaintiff contends that the issuance by McGee of Security's insurance policy constituted an express or implied warranty by Security that the TOPAZ was reasonably fit as a yacht and was therefore seaworthy for all purposes. This contention is overly broad and obscures the true legal relationship. An underwriter, by requesting and receiving a condition and valuation survey as well as a report that survey recommendations had been met, and by issuing a policy on the vessel predicated upon such survey information, can be said to have admitted seaworthiness of the yacht for insurance purposes. In short, the vessel is found to be insurable by the insuror vis-a-vis the insured pursuant to policy conditions. However, these acts of the underwriter do not constitute any

warranty of seaworthiness analogous to that owed by a shipowner to seamen or any other category of person including the plaintiff who may see fit to fashion such a remedy.

Inasmuch as Security can therefore only be liable under the policy to the extent that its assured, Jack Young, is liable, his status requires examination. For reasons discussed in detail in section C, *infra,* this Court finds that Jack Young is not liable to the plaintiff under any theory advanced in this lawsuit. Accordingly, Security has no liability to plaintiff under the policy in question as a consequence of the activities or status of Jack Young.

No contention has been made that Security committed any tort, either negligent or intentional, whether by misfeasance or nonfeasance. It has been urged, however, that Surveyor Roberts, in performing his survey, acted as an agent of Security, that he was negligent and that his negligence should be imputed to Security. This Court finds from the evidence, however, that Surveyor Roberts was not an agent of Security and that he was, instead, an independent contractor, engaged either by Jack Young or Robert Young to perform a condition and valuation survey for insurance and appraisal purposes. Robert Young testified that Surveyor Roberts was recommended by Mr. Ralph Zinnecker, Assistant Manager of Clear Lake, to make the survey. Jack Young testified that Billy Gilbert, then employed by Wm. H. McGee & Co., recommended Surveyor Roberts.[23] Assuming, *arguendo,* that Mr. Gilbert of Wm. H. McGee & Co. did recommend Roberts from an approved list of marine surveyors, this

23. *See also* deposition of Billy Gilbert at 18.

Court can only conclude that Surveyor Roberts was actually *hired* by the insured, Jack Young,[24] and was not in any legal sense an agent of Security.

One of the prime elements necessary to establish an agency relationship is "the existence of some degree of control by the principal over the conduct and activities of the agent." 3 Am. Jur. 2d, *Agency*, § 2 (1962). Courts have construed this rule to mean that, even though a principal employs another to achieve a certain result, if the principal has no right of control over the manner and method by which that result is reached, then the negligence of the actor is not imputed to the principal, *Walter Irvin, Inc. v. Vogel*, 158 S.W.2d 93 (Tex. Civ. App.—Amarillo 1942, *writ ref'd w.o.m.*); Restatement of the Law Second; *Agency* § 250 at 549 (1958). *Cf. Newspapers, Inc. v. Love*, 380 S.W.2d 582 (Tex. Sup. 1964). In the instant case, there was merely a recommendation made by an employee of Wm. H. McGee & Co. that Surveyor Roberts would be a competent marine surveyor. Security Insurance Co. did not hire Surveyor Roberts and did not pay his fee;[25] it had no right to, and, in fact did not, exercise any control over the manner and mode of Roberts' performance of the survey. Similarly, Wm. H. McGee & Co., through which Security acted, is an independent contractor over which Security exercises no control. This is particularly so in connection with marine insurance matters in which McGee acts as insurance manager, rather than agent for Security.

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24. Testimony of Surveyor Roberts; *see* deposition of Billy Gilbert at 67-68.

25. It was agreed that McGee would pay Surveyor Roberts' fee if McGee wrote insurance coverage on the TOPAZ.

Security, therefore, is not chargeable with the liability for any of McGee's actions.

Contrary to another of plaintiff's contentions, and irrespective of the actual ownership of the yacht TOPAZ, Security is not liable under its policy issued to Jack Young for any duties owed to the plaintiff by Young Furniture Mfg. Co. It is Jack Young, individually, and not the Company that is the assured. There is testimony to the effect that Wm. H. McGee would not have written insurance for a corporation on a Yacht Form in return for a pleasure purpose premium rate, since the potential liabilities of the corporation were much greater than those in situations where an individual is concerned.[26] In short, a larger premium would have been charged to the corporate client. This Court cannot find any basis in the record justifying reformation of the policy so as to obligate Security to insure the Company, absent a showing that the named assured was so designated as a matter of mutual mistake, particularly since reformation in this case would extend the risks covered by the insurer without any consideration for such an extension, J. Appleman, 4A Insurance Law & Practice § 2914 at 649 (1969). See also, J. Appleman, 13 Insurance Law & Practice § 7618 at 390-91 (1943).

Finally, this Court finds that Robert Young compromised and settled his claim for personal injuries resulting from the explosion and fire aboard the TOPAZ by his endorsement of Wm. H. McGee & Co.'s settlement draft in the amount of one thousand dollars, which draft reads:

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26. Testimony of John Barnes.

> being in full payment and satisfaction of all claims and demands for loss, damage or expense for: All losses and/or personal injuries sustained from fire and/or explosion of subject vessel.

His acceptance of the same in a case such as this where liability is disputed, notwithstanding the attempt to vary the terms of the draft by unilaterally marking through certain portions of the material quoted, *supra*,[27] operates as a bar to further claims on the assured or his insurer, *Groves v. Sawyer*, 384 S.W.2d 193 (Tex. Civ. App.—Eastland 1964, *writ ref'd n.r.e.*).

C.

## JACK A. YOUNG AND YOUNG FURNITURE MANUFACTURING CO.

Plaintiff alleges that either Jack Young or the Company is the owner of the TOPAZ, and that the party found to be the owner by the Court is liable to plaintiff for breach of the warranty to furnish a seaworthy vessel. Plaintiff further contends that if Jack Young is found to own the TOPAZ, then the Company should be construed to occupy the position of bareboat charterer or owner pro hac vice. This Court has already discussed and ruled on the question of the doctrine of seaworthiness and its inapplicability to this plaintiff for reasons independent of any ownership question, section A, *supra*. Such discussion and ruling are dispositive of the issue.

No allegations have been made that Jack Young was negligent, and no evidence has been presented which could support such an allegation. This Court therefore

27. *See* defendant Security's exhibit 1.

finds that Jack Young has breached no duties owed to the plaintiff, nor has he in any manner contributed to plaintiff's injuries.

It is contended that Young Furniture Mfg. Co., Inc. owed a duty to the plaintiff to furnish him a safe place to work as he cleaned and serviced the TOPAZ in preparation for the entertaining of clients of the Company. If any such legal duties are theoretically owed to seamen or land-based marine workers by the Company under the facts of this case, they are clearly inapplicable to the plaintiff who does not qualify under either category. The only possible relationship between the Company and the plaintiff, a company executive officer, which is conceivably productive of such a duty is that of employer-employee, breach of which is compensable under the Texas Workmen's Compensation Act. The pre-trial order and the final judgment of the State Court[28] filed in this case establish that plaintiff made a claim in state court against the compensation carrier for Young Furniture Mfg. Co., his employer, which claim was settled during the trial thereof, but before the issue had gone to the jury.[29] This recovery, accepted as a full and final settlement, precludes any further recovery by the plaintiff from the Company, *Huckabay v. Hughes Tool Co.*, 122 S.W.2d 233 (Tex. Civ. App.—Galveston 1938, *writ dism'd*); *see Lotspeich v. Chance Vought Aircraft*, 369 S.W.2d 705

28. Defendant Clear Lake's exhibit 4.

29. Plaintiff recovered in settlement the total sum of $32,500 less attorney's fees, of which Utica Mutual Insurance Company paid $16,500, and J. R. Martin, Jr., Robinson & Company, and All Risk Insurance Agency, jointly and severally, paid $16,000. Intervenors in this lawsuit are subrogated insurors, and have intervened in an effort to recover such payments out of any judgment awarded to the plaintiff.

(Tex. Civ. App.—Dallas 1963, *writ ref'd n.r.e.*). Furthermore, this Court finds that the Company was not negligent and that it in no way contributed to the plaintiff's injuries.

D.

SURVEYOR JACK ROBERTS

Although this Court has already treated and dismissed the contention of plaintiff that an agency relationship exists between Security and Surveyor Roberts out of which the liability of either party to plaintiff ensues, there remains for consideration plaintiff's alleged cause of action against Roberts individually. Specifically, plaintiff contends that both the initial marine survey of the TOPAZ and the re-examination and report prepared subsequent to the completion of vessel repairs by Clear Lake constituted an express or implied warranty by Roberts that the TOPAZ would be reasonably fit for the purpose for which it was intended when all recommended repairs had been completed.

As was the situation in the case of Clear Lake, it is impossible from the record of the trial of this case to find that Surveyor Roberts' actions were a proximate cause of plaintiff's injuries. The negligence of the plaintiff, the intervening period of time subsequent to the completion of repairs and relinquishment of custody by Clear Lake, the use for pleasure to which the vessel was put by the Young brothers during such time plus a total lack of proof in a confused record as to causal facts linking this marine surveyor to the casualty compel this Court to find no liability against this defendant.

Although liability cannot be affixed against Surveyor Roberts under the facts of this case, the relationship of

a marine surveyor to the growing number of people owning pleasure boats is worthy of note. As in any profession calling for the exercise of judgment and expertise, there are no rigid guidelines for marine surveyors covering all situations. Yet common sense as well as the law dictate that there is a level of performance below which a surveyor cannot go and escape exposure to liability where, contrary to the present case, such performance can be proven to be causally related to the casualty.

Surveyor Roberts is a marine surveyor of some eighteen years experience, much of his work being in the pleasure craft field. His testimony in this case reflects that the type of marine survey which is performed in a given instance varies greatly with the situation. For example, a vessel which was being purchased would normally be given a thorough examination, and a survey report setting out in detail all defects and potential hazards would be issued. On the other hand, a survey for insurance purposes on a vessel already purchased by the person requesting the survey would be, by comparison, rather limited in scope and duration.[30] The survey conducted on the TOPAZ was of the latter variety, taking some three hours from start to finish including travel time which was estimated to be 1½ to 2 hours. Recognizing that this Court has found no casual relationship between Surveyor Roberts' actions and this plaintiff's accident, the question might well be asked by a layman as to whether a thorough survey could be made upon a vessel of the size, age and condition of the TOPAZ in the space of an hour to an hour and a half.

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30. Direct testimony of Surveyor Roberts when called as a witness for defendants.

Surveyor Roberts further testified that of the three to five marine surveyors in this area who specialize in a yacht practice, most conform to the same standards which he himself seeks to apply to his surveys, namely the National Fire Protection Association release No. 302 (1966).[31] Although no specific provisions contained in this manual were alluded to at the trial, it is obvious from a review of this exhibit that the Fire Protection Standard for Motor Craft is a high one:

> The purpose of this Standard is to provide guidance for the prevention of fuel leakage, the elimination of possible sources of vapor ignition from particularly dangerous locations, the provision of adequate means for keeping vital areas ventilated at all times, the avoidance of unnecessary use of combustible materials in exposed locations and the provision of proper fire extinguishing equipment.

(Introduction, plaintiff's Exhibit 123).

A marine surveyor, particularly one who engages in the burgeoning pleasure boat field where the majority of boat owners are not educated and experienced mariners, performs an indispensable service, often a life-saving service, to his clientele. Whether the survey be conducted for insurance purposes or for the purchase or sale of a vessel, this examination may be, in all likelihood, the only one made by an experienced hand. The landlocked public perhaps can rely on workmen to inspect and repair most major household appliances and not be placed in jeopardy of serious injury or death, at least in the majority of instances, in the event that the repairman inspects in a cursory manner or performs substandard work. But reli-

31. Plaintiff's exhibit 123.

ance by laymen on such skilled professionals as marine surveyors to inspect and advise as to pleasure boats with their sophisticated machinery, high powered engines and other gear must be said to be of a different caliber, one of which the law must take cognizance in a proper case. "There are few other uses of petroleum fuels by the public in which the fire and explosion hazards parallel those possible in motor craft."[32]

IV.

The Court having found against the plaintiff and for the defendants on the liability issues, it becomes unnecessary to explore and pass upon the issues of damages and intervention. The above constitute this Court's Findings of Fact and Conclusions of Law. Counsel will submit within twenty (20) days a proposed Order consistent with this Memorandum. Clerk will notify counsel.

Done at Houston, Texas, this 19th day of January, 1972.

Signed:

CARL O. BUE

United States District Judge

True Copy I Certify

By: MILDRED THOMAS,
Deputy Clerk

---

32. Introduction, plaintiff's exhibit 123.

**APPENDIX B**

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**October Term, 1972**

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No. 72-2967
Summary Calendar

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D. C. Docket No. CA 68-H-489

ROBERT B. YOUNG,
Plaintiff-Appellant-Cross Appellee,

versus

CLEAR LAKE YACHT BASIN, INC., et al,
Defendants-Appellees,

UTICA MUTUAL INSURANCE COMPANY,
ALL RISK INSURANCE AGENCY and
MICHIGAN MILLERS MUTUAL
INSURANCE COMPANY,
Intervenors-Appellees-Cross Appellants.

---

*Appeal from the United States District Court for the Southern District of Texas*

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Before BELL, GODBOLD and INGRAHAM, Circuit Judges.

## JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant-cross appellee pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

March 7, 1973

Issued as Mandate:

## APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 72-2967
Summary Calendar

---

(Filed April 6, 1973)

---

ROBERT B. YOUNG,
Plaintiff-Appellant-Cross Appellee,

versus

CLEAR LAKE YACHT BASIN, INC., et al,
Defendants-Appellees,

UTICA MUTUAL INSURANCE COMPANY,
ALL RISK INSURANCE AGENCY and
MICHIGAN MILLERS MUTUAL
INSURANCE COMPANY,
Intervenors-Appellees-Cross Appellants.

---

*Appeal from the United States District Court for the Southern District of Texas*

---

ON PETITION FOR REHEARING

(April 6, 1973)

Before BELL, GODBOLD and INGRAHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

COPY

AUG 3 19

MICHAEL RODAK, JR.

NO. 73-63

IN THE

# Supreme Court of the United States

ROBERT B. YOUNG, *Petitioner*

v.

CLEAR LAKE YACHT BASIN, INC., ET AL,
*Respondents*

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

Page

RESTATEMENT OF THE CASE ..... 2

REASONS FOR DENYING THE WRIT ..... 4

CONCLUSION ..... 5

CERTIFICATE OF SERVICE ..... 6

## TABLE OF AUTHORITIES

### CASES

Page

*McAllister v. United States*, 348 U.S. 19, 99 L.Ed. 20 (1954) 4

*Young v. Clear Lake Yacht Basin, et al*, 337 F.Supp. 1305 (S.D. Tex., 1972) ..... 5

### STATUTES

28 U.S.C. §1254 ..... 3

### RULES

Supreme Court Rule No. 19 ..... 3

NO. 73-63

IN THE

# Supreme Court of the United States

ROBERT B. YOUNG, *Petitioner*

v.

CLEAR LAKE YACHT BASIN, INC., ET AL.
*Respondents*

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*To The Honorable Justices Of Said Court:*

Respondents, CLEAR LAKE YACHT BASIN, SECURITY INSURANCE COMPANY OF NEW HAVEN, JACK YOUNG, and JACK ROBERTS, respectfully submit that Petitioner, ROBERT B. YOUNG's Petition for Writ of Certiorari should be denied for the following reason:

The decisions below in this matter are not in conflict with any holding of this Court, but instead are based on findings clearly within the discretion of the trial court.

## RESTATEMENT OF THE CASE

It is believed necessary to clarify several matters concerning the holdings of the lower courts in this case before beginning discussion of the reasons the Petition for Writ of Certiorari should be denied.

The judgment of the United States District Court for the Southern District of Texas, is an exhaustive opinion reciting both the factual reasons and legal reasons defendants were exonerated from liability. The Court of Appeals for the Fifth Circuit rendered a *per curium* affirmance stating that its affirmance was based upon the District Court's opinion. Petitioner, nevertheless has asked this Court to review the affirmed fact finding of the District Court that Petitioner's injuries were proximately caused by his own negligence.

## REASONS FOR DENYING THE WRIT

The District Court held, assuming arguendo the Petitioner's version of the facts, that when Petitioner proceeded to activate electrical appliances aboard a vessel absolutely reeking with gasolene fumes, with full knowledge of the danger involved, his own negligence proximately caused the explosion, and fire, which caused his injuries. This is a pure fact finding supported by the evidence offered before the trier of the facts and is not clearly erroneous. *MacAllister v. United States,* 348 U.S. 19, 99 L.Ed. 20 (1954). A finding that the Petitioner's injuries resulted from his own negligence disposed of Petitioner's cause of action without reaching any of the various legal theories that the District Court also held exonerated all Defendants.

Respondents submitted a lengthy brief in the United States Court of Appeals for the Fifth Circuit, and the District Court wrote a lengthy opinion with regard to the various legal theories which also supported the judgment of the Honorable courts below. We respectfully refer this Court to the District Court's opinion which is appended to the Petition for Writ of Certiorari on file herein for Respondents' reply to the various legal theories advanced by Petitioner in an attempt to avoid the District Court's dispositive fact finding. See also *Young v. Clear Lake Yacht Basin, et al,* 337 F. Supp. 1305, (S.D. Texas, 1972).

Petitioner's argument before this Court, just as before the Court of Appeals for the Fifth Circuit, is nothing more than an attack on the impartiality of the District Court and an attempt to re-litigate fact findings which two courts have found amply supported by the evidence. It is submitted that the decisions by the two lower courts are not in conflict with any decision of this Court, do not involve any Constitutional questions, and do not present any legal issues which merit this Court's attention. (28 U.S.C. 1254, and Supreme Court Rule #19)

## CONCLUSION

Respondents, CLEAR LAKE YACHT BASIN, INC., SECURITY INSURANCE COMPANY OF NEW HAVEN, JACK ROBERTS, and JACK YOUNG, respectfully submit that while each has been exonerated from liability on one or more legal theories, all of which amply support the lower Court's holdings, the District Court's affirmed findings of fact are dispositive of this

case and not clearly erroneous and therefore the Petition for Writ of Certiorari should be denied.

ROSS, GRIGGS & HARRISON

By _____
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**CERTIFICATE OF SERVICE**

I hereby certify that on this ____ day of _____, 1973, three true copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were placed in the United States mail, postage prepaid, to all counsel of record in this cause.

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